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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY BISHOP,

Defendant and Appellant.

E053891

(Super.Ct.No. RIF10001248)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Senior Assistant Attorney General, Keith Vienna, Deputy
Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Timothy Bishop (defendant) seeks relief from a \$411.96 criminal justice administration or “booking” fee, arguing that the trial court improperly imposed the fee without first determining his ability to pay it. We disagree and will affirm.

FACTS AND PROCEDURAL HISTORY

On February 7, 2010, defendant was arrested by a Riverside County sheriff’s deputy who responded to a call from a victim who reported that defendant had threatened to kill her. On March 29, 2010, the district attorney of Riverside County filed an information charging defendant with making criminal threats (Pen. Code, § 422, counts 1 & 3, felonies); resisting a peace officer by means of threats and violence (Pen. Code, § 69, count 2, a felony); and battery upon a spouse (Pen. Code, § 243, subd. (e)(1), count 4, a misdemeanor.) The information also alleged that defendant had a prison prior for burglary (Pen. Code, §§ 459 & 667.5, subd. (b)), and that he had suffered a prior serious and violent felony or “strike.” (Pen. Code, §§ 667, subds. (a), (c) & (e)(1), & 1170.12, subd. (c)(1).)

On April 12, 2011, defendant pled guilty to count 2, admitted the prison prior and the strike, and waived referral to probation. In taking his plea, the court confirmed that defendant had reviewed the negotiated plea agreement with his attorney, including specifically the “Consequences of Plea, Defendant’s Statement, and Plea Agreement” sections; and that he had no questions about any section of the plea agreement. Item (B)(3) in the Consequences of Plea section, initialed by defendant, stated “I will be

ordered to pay a restitution fine of at least \$200. . . . There are several other fines and fees that will be imposed as a result of this guilty plea.”

On April 28, 2011, the court sentenced defendant to three years and eight months in prison: the low term of 16 months for count 2, doubled because of the strike, plus one year for the prison prior. In addition, the court ordered defendant to pay various fines and fees, including a \$411.96 “booking fee.” The court did not indicate under which statutory provision the booking fee was being imposed, and none was included or referenced on the minute order. Defendant did not object to any of the fines or fees. The remaining counts and allegations were dismissed.

DISCUSSION

Defendant assumes that the booking fee was imposed under Government Code section 29550.2¹ and must be stricken because there was no substantial evidence to support a finding of his ability to pay it, as subdivision (a) of the statute requires. He also complains that there is no evidence supporting the amount of the fee. The People reply that defendant waived the issue by failing to object in the trial court.

We conclude: (1) that because defendant was arrested by a deputy sheriff, the booking fee could only have been imposed under section 29550, not 29550.2, that (2) since he was not granted probation but sent to prison, the controlling provision under section 29550 is subdivision (d)(1), which requires no determination of his ability to pay

¹ All further statutory references are to the Government Code unless otherwise indicated.

the fee; and (3) that defendant forfeited any objection he might have had to the amount of the fee by failing to object in the trial court.

Government Code Sections 29550, 22950.1, and 22950.2

Government Code sections 29550, 22950.1, and 22950.2 govern fees for processing or “booking” arrested persons into a county jail. To a certain extent, the fees vary depending on the identity of the arresting agency and the eventual disposition of the person arrested.

Arrests made by an agent of a city or college, “or other local arresting agency” are governed by sections 29550, subdivision (a)(1) and 29550.1. Under section 29550, subdivision (a)(1), the county may charge the local arresting agency a booking fee. When it does so, under section 29550.1, “The court *shall*, as a condition of probation, order the convicted person to reimburse the [local agency].” (Italics added.)

Arrests made by a county agent or officer are governed by section 29550, subdivision (c). Under subdivision (c), if the person is convicted of a crime related to the arrest, the county is entitled to recover a booking fee from the arrestee, but the fee may not exceed its actual administrative costs, including fixed overhead.

Section 29550, subdivisions (c), (d)(1) & (d)(2) specify what a court is to do when it has been notified that the county is entitled to a booking fee. Under subdivision (d)(1), the judgment of conviction “may” include an order imposing the booking fee. However, under subdivision (d)(2), if the person convicted is granted probation, the fee becomes mandatory, although subject to a finding of an ability to pay: “The court *shall*, as a

condition of probation, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the . . . fee.” (Italics added.)

Finally, arrests made by “any governmental entity not specified in Section 29550 or 29550.1” are governed by section 29550.2, subdivision (a). In general, with one subtle difference, the language of this provision is consistent with the language of the others. The difference is that, under section 29550.2, all convicted persons—those sent to prison as well as those granted probation—are subject to a mandatory booking fee conditioned upon their ability to pay. The county may be entitled to recover a booking fee, but whether it can get an order for the fee depends on the arrestee’s financial condition.

All of this explains why our defendant insists that the fee in his case was imposed pursuant to section 29550.2. He wants it to be conditioned on his ability to pay. However defendant was arrested by a Riverside County deputy sheriff. Accordingly, his case is governed by section 29550, subdivisions (c) and (d)(1), not section 29550.2. Furthermore, since he was not granted probation, under section 29550, subdivisions (c) and (d)(1), a fee is due and must be included in the judgment of conviction. Under subdivision (d)(1), no ability to pay determination is necessary.

Forfeiture

Generally, in the interests of fairness and judicial economy, only claims of error properly raised below and preserved by the parties are reviewable on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Smith* (2001) 24 Cal.4th 849, 852.) The waiver rule applies—even in the absence of factual evidence supporting the defendant’s ability to pay, for instance, to fines and fees which could otherwise have been lawfully

imposed. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 (*Valtakis*).) “The purpose of the waiver doctrine is to bring errors to the attention of the trial court so they may be corrected or avoided. [Citation.] The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law. [Citations.]” (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 (*Gibson*).) Parties may not “stand silent as the court imposes a fee . . . and then complain for the first time on appeal that some aspect of the statutory procedure was not followed[.]” (*Valtakis, supra*, at p. 1075.) The waiver rule applies to the People as well as to defendants. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303.)

Ability to Pay

Regarding booking fees in particular, there is a split of authority with regard to whether the trial court is required to determine a criminal defendant’s ability to pay the fee before imposing it, and whether objection is necessary to preserve a claim that the determination was not made. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [a defendant who fails to object to the imposition of a section 29550.2 booking fee in the trial court forfeits a challenge to the fee on appeal, notwithstanding the court’s failure to determine his ability to pay]; *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*) [a defendant who fails to object to either a section 29550 or a section 29550.2 booking fee does not forfeit a challenge to the fee on appeal if the challenge is to the sufficiency of the evidence to support a determination that the defendant had the ability to

pay the fee]). The California Supreme Court is currently reviewing this question in *People v. McCullough*. (Review granted June 29, 2011, S192513.)

As might be expected, defendant relies primarily upon *Pacheco* as well as upon *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), a case upon which *Pacheco*, in turn, relied. Neither applies. *Viray* dealt with an attorney fee assessment imposed without objection following a request for it by the client's assigned counsel, the public defender. (*Viray, supra*, at pp. 1213, 1217-1218.) On appeal, the People argued that the defendant had forfeited her claim by failure to object. (*Id.* at p. 1214.) The appellate court reasoned that, where a defendant's attorney asks the court to impose fees on the client for the attorney's own benefit or the benefit of his or her employer (including the public defender's office), the waiver rule does not apply. Under such circumstances, the attorney's conflict of interest essentially renders the client unrepresented and a client "cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his own fees." (*Ibid.*) *Viray* limited its holding to attorney fees. (*Viray*, at p. 1216, fn 15.)

Nor is *Pacheco* applicable. As in our case, the trial court in *Pacheco* did not specify the statutory basis for the booking fee it imposed. (*Pacheco, supra*, 187 Cal. App.4th at p. 1399.) But, unlike in our case, in *Pacheco* there was also no evidence as to what agency had arrested the defendant. (*Id.* at p. 1399, fn 6.) In addition, the *Pacheco* defendant was placed on probation, not sentenced to prison. (*Id.* at p. 1395.) In reviewing the matter, the appellate court first held that ability to pay claims based on sufficiency of the evidence are generally not forfeited for purposes of appeal. (*Id.* at p.

1397.) It then separately addressed attorney fees, booking fees, and probation supervision fees, finding that the statutory basis for the booking fee—whether section 29550 or 29550.2—is irrelevant because under each provision, imposition of a booking fee is subject to an ability-to-pay finding. (*Pacheco*, *supra*, at pp. 1397-1401.)

We agree with the *Pacheco* court’s conclusion so long as the dispute concerns the imposition of the fee on a defendant who is the fortunate beneficiary of a grant of probation. However, where the fee is imposed on a defendant who is sentenced to prison, under the relevant provisions, subdivisions (c) and (d)(1) of section 29550, no ability to pay finding is required, and the reasoning of *Pacheco* does not apply.²

² We assume the Legislature had good reasons for making the distinction between defendants sentenced to prison and those granted probation since defendants found to be ineligible for probation have generally been convicted of more serious crimes or have more extensive criminal histories than those eligible for probation. For defendants destined for prison, an ability-to-pay determination is usually irrelevant; if they cannot pay at the time they are sentenced, they can work off the fee while in custody. Defendants who are eligible for probation, on the other hand, are being granted conditional release partly to aid in their rehabilitation and partly because they are (considered) less dangerous to the public. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) These goals would be ill-served if such a person were burdened by costs beyond his or her ability to pay them. It would not be helpful, for instance, for a probationer to feel impelled to commit another crime in order to get the money to pay a booking fee.

The Amount of the Fee

Defendant also complains that the amount of the fee is not supported by evidence of actual administrative costs. Again, he cites to an inapposite statutory provision, but in this instance, his error does not matter. Sections 29550 and 29550.2 both provide that the fee cannot exceed actual administrative costs. (§§ 29550, subds. (c) & (e); 29550.2, subd. (a).) Under section 29550, subdivision (c), “The fee . . . shall not exceed the [county’s] actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons.” Here, as defendant claims, there is no evidence in the record about exactly how the county determined its administrative cost for booking him. There is, however, evidence that defendant accepted as appropriate the amount imposed. He confirmed both in writing and orally in open court his understanding that “several other fines and fees” would be imposed as a consequence of his negotiated guilty plea. He also confirmed orally to the court that he had reviewed his negotiated plea with his attorney and had no questions about any section. Finally, neither he nor his attorney objected to the amount of the fine. We conclude that defendant forfeited any objection he may have had to the amount of the fine by standing silently by in the trial court and failing to object on that basis. (*Valtakis, supra*, 105 Cal.App.4th at p. 1075.)

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P.J.

KING
J.